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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

Nos. 369 and 138

NATIONAL MEDIATION BOARD, et al.,
Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES,
Respondent.

No. 369

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES,
Respondent.

No. 138

CONSOLIDATED BRIEF OF RESPONDENT, Association for the Benefit of Non-Contract Employees, in Reply to Brief Filed by the National Mediation Board and Its Members and Brief Filed by the Brotherhood of Railway Clerks in Cases No. 138 and No. 369.

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Association for the Benefit of Non-Contract Employees, in Reply to Brief Filed by the National Mediation Board and Its Members and Brief Filed by the Brotherhood of Railway Clerks in Cases No. 138 and No. 369.

QUESTIONS PRESENTED

1. Does the Railway Labor Act give employees the right to vote for or against collective bargaining representation?

2. Assuming such right is granted to the employees, does the ballot used by the National Mediation Board deprive employees of that right by its form?

3. Does the District Court have jurisdiction to stay an election in which a ballot form so deprives employees of the right?

4. Does a District Court having determined that a ballot to be used in a representation election should contain spaces wherein voters could indicate their preference for or against representation have jurisdiction to make an order affording the National Mediation Board an opportunity to reconsider granting a hearing on the constituency of the craft or class concerned in view of the Court's determination of the requirement of the Railway Labor Act as to the ballot.

STATUTES INVOLVED

In addition to the statutes referred to in the brief filed by the National Mediation Board, being the several provisions of the Railway Labor Act, 45 U.S.C. 151, et seq., the respondent designates the following:

1. The Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. The Administrative Procedure Act, 5 U.S.C.A. 1009.

Said provisions are set forth in Appendix A attached hereto.

STATEMENT

Respondent agrees generally with the statement set forth in the brief on file herein of the National Mediation Board.

Respondent, however, had no knowledge of the facts set forth under the heading "3. The Change in the Ballot" however, until the Board's decision was publicly announced. No conference or discussion took place between respondent and the National Mediation Board in the formulation of this additional language to be placed on ballots after November 23, 1964.

SUMMARY OF ARGUMENT

The Railway Labor Act affords employees the right to vote for or against collective bargaining representation.

This is admitted by the National Mediation Board.

The ballot form used by the National Mediation Board creates an election procedure in which the employees are faced with an ambiguous and confusing situation. The employees' right to vote for or against collective bargaining representation is effectively weakened, if not denied, by the National Mediation Board's election method.

This is also admitted by the National Mediation Board.

The additional language offered by the National Mediation Board as Instructions for Voting, while an admission of error by the Board, as to its former ballot, does little to clarify the confusion the ballot form provides. The simple, straight-forward solution to the problem is the addition of a box on the ballot which an employee can mark, indicating his desire for no representation. Any other device merely further complicates an already complicated and obscure procedure.

Actions by an administrative agency which are outside the statutory authority of the agency permit judicial intervention. This principle is based upon broad constitutional concepts and is specifically delineated in *Leedom v. Kyne*, 358 U.S. 184. Additionally, jurisdiction is vested in the Courts under the provisions of the Administrative Procedure Act.

In this case, the Courts below have determined that the National Mediation Board acted in excess of its delegated powers in denying to the employees under its jurisdiction a clear and unequivocal opportunity to exercise a right which the Board admitted was granted to them by the Railway Labor Act. That determination was correct and legally made.

ARGUMENT

THE NATIONAL MEDIATION BOARD ADMITS THAT THE NATIONAL RAILWAY LABOR ACT AFFORDS EMPLOYEES THE RIGHT TO VOTE FOR OR AGAINST COLLECTIVE BARGAINING REPRESENTATION.

In discussing the Act, the Board comments at length on the general scheme of the legislation and

points out that no specific wording is provided therein for a ballot form. To prove that the ballot form is not an "unreasonable construction" of a mandate from Congress to the Board (National Mediation Board Brief p. 40), the Solicitor General states that in his opinion the "old" ballot was unfair, but that the "new" ballot which is to include the additional wording shown in the National Mediation Board Brief is fair, in that it, "plainly advises each and every employee how to express a preference for no collective bargaining." The Board, on the Solicitor General's representation, changed the ballot. (National Mediation Board Brief, p. 30.) Continuing, the Board's brief states:

> "There is nothing in the present procedure that requires employees to designate a representative or hides the opportunity to reject all the contending unions."

These statements must be taken admit that which is patent in the Railway Labor Act, namely that employees have a right to reject representation if they so desire.

Quoting from the Act, as amended in 1934, 44 Stat. 577, 45 U.S.C. 152, in part:

> "Section Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

The Board rightly interprets this section and Section 2, Ninth of the Act to mean that if less than a majority of employees vote in an election for a representative, that employees in the craft or class have exercised their right to have no representation. This point is set forth in a footnote (National Mediation Board Brief p. 33, footnote) as follows:

> "In the district court government counsel stated (R. 144-145) that the Board 'has taken the position that the language of the statute requires a representative' and that employees 'just don't have a right to vote for no representation.' But the Board's consistent practice of refusing to certify a representative unless a majority of all the employees in the craft or class (as distinguished from a majority of those voting) vote for representation would seem to refute that statement. In any event, the Board presently does not hold the views that government counsel ascribed to it in the district court—as its recent action in changing the form of the ballot so clearly demonstrates (see supra, pp. 13-14, 23)."

These statements confirm the Board's admission that under the Railway Labor Act, the employees have a right to vote for no representation.

THE NATIONAL MEDIATION BOARD ADMITS THAT THE FORM OF THE BALLOT PROPOSED FOR USE IN THE UNITED ELECTION WAS UNFAIR.

The Board, acting on the representation of the Solicitor General, changed the ballot form. The ballot form which had been proposed to have been used was,

in the opinion of the Solicitor General, "unfair" (National Mediation Board Brief p. 30), admitting that:

> "it could be argued that this method (failure to cast a valid ballot) of opposing any representation was insufficiently publicized because the Board did not announce it on the ballot and employees were unlikely to read the lengthy rules for conducting elections in which it appeared."

and continuing on said page, states that the present ballot is fair. To effect this change, the Board has added this language.

> "Instructions for Voting
>
> No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

Throughout these proceedings, the Respondent has argued that the employees were entitled to a clear and unequivocal election procedure by which they would cast a vote for no representation. It was stated that no legend or direction existed on the ballot with respect to exactly what was to be done by the voter in order to cast a vote for no collective bargaining representative.

While the Board now, immediately before the filing of its Brief has added something, the question is, has the situation been clarified? The best answer is supplied the Board in its Brief (National Mediation Board Brief p. 31):

> "It is far from obvious that it is appreciably easier to mark the box designating one of the

unions than it is to cast a blank ballot, spoil the ballot, or cast no vote."

The National Mediation Board thus gives us at least three methods of proceeding. Which is correct? In considering the sample ballot provided in the appendix to the Board's Brief (National Mediation Board Brief p. 64), it does not appear that the added language has done anything more than compound the confusion.

The first idea suggested is, "cast a blank ballot." This is confusing in that the instructions at the bottom of the ballot say:

"2. Marks in more than one square make the ballot void."

Squares are provided for each union and a write-in. The specific instruction then is not to mark more than one square. No mention is made of marking no square. While counsel suggests the device, it is not authorized or referred to on the ballot.

The second idea is—"spoil the ballot." But observe the official command of the Board on the ballot!

"3. . . . Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to mediator and obtain a new one."

The specific instruction is directly opposite to that suggested by the Brief. (National Mediation Board Brief p. 31.) The procedure suggested requires the voter to determine that the ballot instruction is incorrect and that he should ignore it. Not only is this con-

fusing, it seems hardly meet or appropriate that a citizen-employee should be required to puzzle out such a procedure. He should not be compelled to disregard an official governmental instruction on any ground, nor should he be placed in a position in which he is seemingly flouting the authority of the National Mediation Board in order to exercise his right under the Railway Labor Act.

The third suggestion is—"cast no vote." The ballot says however:

"3. Return this ballot in its entirety. . . ."

Again, as in the other instances, a conflict exists. Which instruction is the voter to follow? The National Mediation Board's suggestions as to procedures the voter should follow are contradictory to the wording of their ballot. The wording they have added does not resolve the problem nor does it authorize or instruct the employees clearly how to vote against representation.

The difficulty of applying the Board's suggestions in an election must be multiplied a hundred-fold when considering the problem as it will face an uninformed employee when he is confronted with this election procedure.

The ballot which was to have been used in the United election was unfair. It was so characterized by the Solicitor General. The National Mediation Board acting on that representation changed it. As per the foregoing argument the change has not effected the necessary purpose, to-wit: to clarify the

method in which the employee can exercise his right to vote for no representation.

Where the right has been thus obscured and confused, the employees have been effectively deprived of that right. It is this action by the National Mediation Board to which the respondent has addressed its action in the Courts below.

THE ACTION OF THE NATIONAL MEDIATION BOARD IN DEPRIVING THE EMPLOYEE OF HIS RIGHT TO VOTE AGAINST REPRESENTATION IS IN EXCESS OF ITS STATUTORY AUTHORITY AND SUBJECTS IT TO THE JURISDICTION OF THE FEDERAL JUDICIARY.

The National Mediation Board and the Brotherhood of Railway Clerks contend in this appeal that the District Court lacked jurisdiction to enjoin the Board from proceeding with an election for a representative for collective bargaining where the ballot failed to contain a space in which a preference could be indicated for no representation. This position rests primarily on the premise that the decisions of the Board are non-reviewable except in the limited situation where the Board exercises its authority in violation of the plainly expressed statutory duty. We feel that this premise is not sustained by the cases; the statute; the legislative history leading to the statutory enactment; or the appropriate provisions of the Administrative Procedure Act.

The Courts may entertain jurisdiction to review the acts of the National Mediation Board where the Board has infringed upon a right granted by Congress, or

where the act was in violation of a constitutional right of the employees.

In *Wes Chapter v. National Mediation Board*, 314 Fed. 2, 234 (1962), the Courts said:

> "Where Courts have taken jurisdiction of such representation disputes the context has strongly indicated either that the Board, by refusing to act has obliterated rights granted to employees by Congress (*Airline Dispatcher Association v. NMB*) or turning now to a situation arising under the National Labor Relations Act, the Board had acted in excess of its delegated powers contrary to a statutory provision which is 'clear and mandatory' *Leedom v. Kyne*, 358 U.S. 184 (1958). When this occurs, the courts 'cannot lightly infer that Congress does not intend judicial protection of the rights it confers against agency action taken in excess of delegated powers'."

The Railway Labor Act grants to employees the right to vote for or against representation by a collective bargaining representative. This right is illustrated in the following sections:

Railway Labor Act, as amended in 1934, 44 Stat. 577, 45 U.S.C. 152:

> "Section Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organiz-

ing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Agreement to join or not to join labor organizations forbidden

"Section Fifth. No carrier, its officers, or agents, shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

Disputes as to identity of representatives; designation by Mediation Board; secret elections

"Section Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and rec-

ords of the carriers to obtain and utilize such information as may be deeemed necessary by it to carry out the purposes and provisions of this paragraph."

Union security agreements; check-off

"Section Eleventh. Notwithstanding other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted——

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) To make agreements providing for the deduction by such carrier or carriers from the

wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of Section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said service; and no agreement made pursuant to sub-paragraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Pro-*

vided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent any employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."

These sections indicate the number of instances in which the employees' rights are protected. First, the employees have under the Act, the right to organize and bargain collectively through representatives of their own choosing (Section Fourth). There is no requirement that they bargain collectively. The freedom to bargain collectively or not is reinforced by the provision that no carrier "shall require any person seeking employment to sign any contract or agree-

ment promising to join or not to join a labor organization." (Section Fifth). Only where a carrier and employees have mutually agreed upon a union shop, must an employee agree to join a labor organization (Section Eleventh).

Thus freedom of association or non-association is emphasized in the statutory language. The act grants "the right to determine who shall be the representative" of a craft or class to the "majority of any craft or class" (Section Fourth), thus indicating that in the event that the majority refuses to act or cast a vote for a representative that no representative shall be determined.

The question thus presented is whether or not the Board in providing the type of ballot used protects the rights of that "majority." The Board claims that it does because if a majority fails to return any ballot, then no representative is certified.

The language in Section Two, Fourth of the Act providing that the majority shall have the right to determine the representative inherently guarantees that the majority should have an effective method of indicating their preference. Any procedure which is calculated to deprive employees of an effective method is in derogation of the congressional grant. The Board concedes that the right exists, and in fact, devotes considerable time and effort in its brief to demonstrate that the balloting procedure employed by it, protects the right, and in fact, voluntarily and immediately before the submission of the National Mediation Board Brief in this Court, added language which it

maintained, clarified, the right of the employees and guaranteed them an effective method by which they could indicate their preference for no representation.

For the right to exist, employees must be given the opportunity to effectively exercise the right. It is our contention that the District Court was correct in determining that the procedure adopted by the Board denied to the employees an effective method of determining representation.

The ballot in the election procedure has been examined in foregoing sections of this brief. At the time the matter was argued in the District Court as is stated in the National Mediation Board Brief (National Mediation Board Brief p. 33), Counsel for the Board represented that the language of the statute required some representation and that the employees "just don't have the right to vote for no representation." That position has been changed by the Solicitor General. Before this Court, the statement is made:

> "But the Board's consistent practice of refusing to certify a representative unless a majority of all the employees in the craft or class (as distinguished from a majority of those voting), vote for representation would seem to refute that statement. In any event, the Board presently does not hold the views that government counsel ascribed to it in the District Court—as its recent action in changing the form of the ballot so clearly demonstrates." (National Mediation Board Brief, p. 33.)

The ballot now proposed is printed as an official government document and distributed under the offi-

cial title of the National Mediation Board, an agency of the United States Government. It will have on its face, a box for the Brotherhood of Railway Clerks, a box for the International Association of Machinists, and under it a box for a write-in organization or individual. No freedom of choice is afforded the electorate as no specific box or space is provided thereon for a vote for no representation.

In analyzing any ballot, it is obvious that position on the ballot is important. In the ballot originally provided for the election among United employees, the Board saw fit to place the boxes representing the contending unions opposite one another on the page so that no preference could be assumed. The importance of having no area upon the ballot or legend thereon which clearly refers to a vote for no representation cannot be underestimated.

The document is official. Mandatory instructions are set forth in strong terms and in many instances in bold type. The confusion and contradiction between the instructions proposed to be placed on the ballot were set forth in section two of this brief. The message on the official document is undoubtedly of great force and persuasion to the voters. As has been noted, the Board maintains that the employee can manifest his choice by refraining from voting, casting a blank ballot, or destroying the ballot. In view of the instructions analyzed above, the theory is impractical and discriminatory. An extreme doubt must be placed in the mind of the voter who wishes to indicate a preference for no representation in this election when

he is told that the method by which he must do so is by destroying or refusing to return the ballot, contrary to National Mediation Board instructions on that ballot. Certainly a law-abiding citizen must waver when he is confronted by those instructions and legends in bold type on the ballot. The Board cannot seriously maintain that this form affords a voter an effective right to cast a vote for no representation.

Under present Board policy, writing "no representation" in the space marked for a write-in candidate is a void ballot. (Allegheny Airlines, Inc., National Mediation Board Case No. R-3470 (1962).) The respondent's members must, under the present rules, refrain from voting and hope that in some manner, all of its members together with the other persons in the craft or class desiring to vote for no representation, will in some way understand that they must, in defiance of the instructions, destroy or refuse to return the ballot. These employees cannot be said to be "presumably assenting" to any union ultimately certified. The procedure for expressing this dissent remains complex, misleading, and tends to influence the employees by its form.

There is no legend or direction on the ballot which describes exactly what must be done by the voter in order to cast a vote for no bargaining representation. Observation of the words which the Board has consented to add to the ballot, demonstrates that no real attempt has been made even now, to inform the voter.

Should the voter mark the ballot "no representation" or "no union"? Should he return the mailing

envelope and the secret envelope marked A? Should he place his name and address on the outer envelope and include only the inner envelope and the ballot unmarked? The required procedure is highly ambiguous, and while originally indicating unqualifiedly that it would not correct the ambiguity, the Board has now proposed an additional instruction which compounds the confusion.

It is submitted that under these circumstances the National Mediation Board can be said to be "obliterating rights granted to employees by Congress" and has acted "in excess of its delegated powers" contrary to a statutory mandate which is "clear and mandatory" as referred to in *Wes Chapter v. NMB,* 314 Fed. 2d 234.

(A) The Board's Interpretation of Its Statutory Duties Under the Act Is Contradictory.

The real question posed by this case is brought about by the contradictory positions of the Board. On the one hand, it maintains that the election is designed to permit free choice of a representative. On the other, it admits that the ballot is slanted, designed and calculated to cause the employees to vote for the representative or representatives whose names appear on the ballot. This is due to the Board's stated position that its duty is to insure *some* type of representation. This position is fraught with difficulty.

The Board's position was originally stated in a colloquy between Judge Luther Youndahl and Counsel Harland Leathers at the hearing in the District Court where the following exchange took place:

"The Court: They claim they have no right to vote at all.

Mr. Leathers: No, they have a right to vote. They just don't have a right to vote for no representation.

The Court: Isn't that in effect giving them no right to vote?

Mr. Leathers: No, because they can vote for one of the representatives if they wish to.

The Court: Suppose they don't want to vote for either? They are denied to vote on that issue?

Mr. Leathers: Yes, that's right. Understand, they are not denied the right to express their views by refraining from voting." (R. 145.).

While the Solicitor General has disavowed this position, the policy is unreservedly stated in an excerpt from an official Board publication (Administration of the Railway Labor Act, 1934, 1957):

"'The above quoted excerpts from the Act clearly show that it was the intent of Congress in planning the 1934 Amendment . . . that both the carriers and the employees separately designate representatives for the purpose of collective bargaining. To effectuate this mandate of Congress the National Mediation Board, in 1934, designed a form of ballot which has been used without material change to the present time. This ballot was drafted to permit the employees to secure some form of representation as contemplated in the sections of law quoted above. It leaves to the majority of the employees, of any craft or class, full freedom to determine who should be their representative for the purposes of the Act."

Having thus committed itself to a policy of slanting or weighting its election so that some organization or individual will be elected, the Board statement, that it is protecting the right to a vote against representation, cannot be accepted. The Board cannot demonstrate even limited protection by allusions to the employees' right to refrain from casting a ballot, where the employee has been confused and misdirected by contrary instructions of the ballot itself, and has been denied a clear and definite procedure for registering a vote against collective bargaining representation. The proposed addition to the ballot does nothing toward meeting the problem. In spite of the Board's action immediately prior to filing its brief, its fundamental position remains that it has the authority to weaken or obscure one choice in an election, and proposes to continue to do so in the ballot now presented.

(B) The Procedures of the National Labor Relations Board in Regard to Elections.

As has been noted in the National Mediation Board Brief, the National Labor Relations Board and the Courts in the interpretations of procedures under the National Labor Relations Act have decided that a ballot without a box or space for a no representation vote deprives the employee of an effective voting method.

The problem with respect to a ballot in a representation election is certainly not unique to the National Mediation Board having been dealt with for

many years by the National Labor Relations Board. That Board, in handling many hundreds of industries, in some instances, of equal sensitivity and importance to those companies and industries with which the National Mediation Board is concerned, has traditionally provided a space within which voters can indicate their preference to vote against bargaining representation.

If only one union is involved, the ballot will contain a yes and no box. *Solomon Manufacturing Company,* 3 NLRB 926, amended 4 NLRB 36 (1937); *Walker Vehicle Company,* 4 NLRB 242 (1937) and *Interlake Corporation,* 4 NLRB 55 (1937).

The position of the National Labor Relations Board was expressed in the *Interlake* case *supra,* wherein the National Labor Relations Board denied the motion of two contending labor unions to have the words "or by neither" struck from the ballot saying:

> "The Act, however, does not require an unwilling number of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet, if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one of the other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives. . . .

It was contended by counsel for Steel Workers Organizing Committee, that the privilege of an employee to indicate that he does not desire either of the named unions to represent him, if it must be preserved, could also be expressed by refraining from voting or by casting a blank ballot. In line with other authorities, both before and after our decision, however, we indicated in matter of R.C.A. Manufacturing Company, Inc. *supra* that those not voting would be presumed to acquiesce in the choice of the majority who do vote and thus the employee who does not desire to be represented by either designated union would not express this preference by refraining from voting. As to the solution of casting a blank ballot, the practice of the Board, again in line with other authorities, has been to hold that a blank ballot must be regarded as a failure to vote by one qualified to do so. We see no advantage in forcing employees who disapprove of the nominees to adopt the rather ambiguous method of expression involved in casting a blank ballot when their choice can be clearly indicated by providing a space therefor.

For the reasons which we have outlined, it is the conclusion of the Board that a free expression of desires of the majority of the employees in the unit found appropriate in the present case demands that the ballot provide for a space in which employees may indicate that they do not desire to be represented by either of the named organizations. The motion to amend the directions of election by striking therefrom the words 'or by neither' is hereby denied."

It should be noted that this case was decided prior to 1947 when express language giving employees the right "to refrain from" organizing was added to the National Labor Relations Act. The National Labor Relations Board stated the only fair conclusion arising from the operation of the election procedures as they then existed in a statute which provided no specific ballot form. The identical situation is now being administered by the National Mediation Board. The attitude and conduct of the Board with respect to the situation is unjustifiable under its statutory authority or as will be shown under constitutional guarantees which extend to employees under its jurisdiction.

In the one case in which the Courts have commented on the form of the ballot used by the National Mediation Board, *McNulty v. NMB*, 18 F. Supp. 494 (N.D.N.Y. 1936), although by way of dicta, the Court had this to say:

> "It is manifest that this ballot did not present the issue to the eligible voters.
>
> "The issue, of course, as the mediator admittedly found, was whether the men desired to continue under the individual contract method or the National Union representation.
>
> "Concerning these two methods, the O.R.T. Brief says: 'These two methods of employer-employee relationships are diametrically opposite, both in theory and practice. They have nothing in common. There can be no representation under the first method and representation is essential under the other.'

"But the employees had no opportunity to express a choice between these methods. They were in effect told that they must have representation for collective bargaining and were asked to elect between the National Union (O.R.T.) and an unknown.

"Unless the statute in question is meant to compel a majority of the employees (not an individual employee) to surrender their constitutional right to contract for their own services, and the defendant O.R.T. does not so contend, then the ballot in question in no real sense determines whether the employees wish to retain the old method of individual bargaining, or prefer to change over to collective bargaining.

"In short, the ballot is an artificial thing in no wise disclosing which method of contracting the majority wish, but merely shows that, if they must have collective bargaining, they preferred the O.R.T. to some unknown person or organization.

"It is idle to say that 'it was not necessary for the contract men to affirmatively vote their desire in order to win but merely necessary, that their vote be against representation by the O.R.T.'

"Fifty employees tried to do just that by putting an X mark in the square opposite the words 'if you desire representation by any other organization or individual, mark an X in the square,' but because they did not write in the name of some organization or individual as representative in collective bargaining, the votes were declared void and not counted.

"The ballot gave them no opportunity to vote against representation by the O.R.T., for their

choice was limited to representation by O.R.T. or by some unknown representative.

"Confronted with such a ballot which may have feared that some militant group might want to write in the name of the President of the railroad or some obnoxious foreman, and believing that they had to select someone to represent them in collective bargaining, rather than take such chances on an unknown representative, they voted for the known O.R.T.

"How they would have voted had the real issue before them been presented by the ballot, no one knows or can know until another ballot presenting that issue is taken."

While it is admitted that the statutory authority of the National Labor Relations Board is different than that under which the National Mediation Board functions, it is nevertheless difficult to understand how or why it may be stated that the employees in one industry should be given an unequivocal right to vote and the employees in the other should be caused to suffer a confusion and dilution of their right to vote by the agency under whose jurisdiction they happen to fall.

(C) To Claim That the Scheme of the Railway Labor Act Affords Freedom of Choice on the One Hand and Authorizes a Procedure by the Board Calculated to Determine the Choice on the Other, Is Contradictory to the Legislative History of the Act.

The Board seeks to escape this dilemma by interpreting the Act as imposing upon it the mandate to enforce collective bargaining. We submit that it does

not. No express direction is contained in the Act and any implied mandate must twist or distort that wording. Any ambiguity, if one can be said to exist is clarified by an observation of the statements made at the time of the enactment of the Act by the legislature and its draftsmen.

The House report of HR 9861 which accompanied the 1934 Amendment to the Act, read:

> "... it (HR 9861) provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire, and forbids interference by the carrier's officers with exercise of said rights (House Report 1944 to accompany HR 9861, U.S. House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Congress, 2nd Session, 1934, at page 2.)"

Commissioner Joseph P. Eastman, Federal Coordinator of Transportation, referred by the Supreme Court in the *Switchman's* case as the draftsman of the 1934 amendment testified in the House on HR 7650. Mr. Eastman's views were accepted in the *Switchman's* case at 320 U.S. 297, 302-3. In the House, he said:

> "Mr. Huddleson: Well, as I get your idea, it is the purpose of this bill not to coerce organization and not necessarily to imply organization.
>
> Commissioner Eastman: No. It does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why that of course is left open to them, or it should be. (Hearings

HR 7650, U.S. House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Congress, 2nd Session, 1934, at page 57)."

In the Senate, on Senate Bill 3266, Senator Wagner, the outstanding figure in labor legislation at the time, made the following statement:

"Senator Wagner: I am very glad you (Commissioner Eastman) are bringing out these points so very clearly. . . . I think that it is the purpose of the Act—I think it is so expressed in language, to give the worker a free choice to join any union he wants, company union or no union, and yet they (i.e., the opponents of the Bill) have insisted (that) by giving him free choice that it creates a large national union. I do not know how that conclusion is reached, but it has been broadcast, so I am very glad you are clearing that point. (Hearings on S-3266 U.S. Senate, Committee on Interstate Commerce, 73rd Congress, 2nd Session, 1934, at page 12.)

"Senator Wagner: I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the man had absolute liberty to join or not join any union or to remain unorganized. (id. p. 76)."

The legislative history of the Act is diametrically opposed to the Board's contention of a "mandate", but rather gives strong support to the position that under the statute employees were given a right to vote for or against collective bargaining representation. Without some demonstrated language, implication, or legislative history, save and except the

Board's own pronouncements, actions which take away Congress-given rights of the employees are unjustifiable and in excess of powers delegated to the National Mediation Board. If the meaning of the Act, as intended by Congress, was that employees must bargain collectively, the Act may have read:

> "Employees shall elect representatives from individuals or unions who shall then be their representatives for the purpose of the Act."

No such language appears and the legislative history referred to hereinabove indicates that this was not the intention of the Congress.

THE ACTION OF THE NATIONAL MEDIATION BOARD IN DEPRIVING THE EMPLOYEES OF THEIR RIGHT TO VOTE AGAINST COLLECTIVE BARGAINING REPRESENTATION WAS AN ABRIDGMENT OF THE CONSTITUTIONAL RIGHTS OF THE EMPLOYEES WHICH PERMITS JUDICIAL REVIEW.

Thus far, arguments have been directed to infringement by the National Mediation Board of rights granted to the employees by Congress by the Railway Labor Act. In addition to limitation on infringement of Congress-given rights, the Board is bound by the limitations of the United States Constitution, and the Federal Judiciary had a right to review the actions of the Board in that light. In *Switchman's Union of North America v. NMB,* 320 U.S. 292, which is heavily relied upon by the Board and the Brotherhood of Railway Clerks, the Supreme Court barred judicial review of craft or class determinations by the Board. At no time, however, did the Court sanction Board

decisions made in excess of the constitutional guarantees of the employees and specifically left that question open, avoiding the constitutional question in these words:

> "Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is up to the Congress to determine how the rights which it creates shall be enforced. Tutun v. U.S., 270 U.S. 568, 576, 577, 46 S.Ct. 425, 70 L.Ed 738. In such a case the specification of one remedy normally excludes the other." (Citing cases.)

Depriving employee voters of their clear and unequivocal right to cast a vote is to deprive them of their rights under the Fifth Amendment of the Constitution of the United States. Valuable property rights, to wit: their individual bargaining agreements, with their employer, will be taken from them without due process of law.

In large majority, the group sought to be organized by the unions in the case at bar has traditionally had no representation. As to the members of the group in the public contact division of United Air Lines, for example, long term individual agreements reached through training, educational requirements and seniority have been established. In the instance of electronic computer personnel, development and qualification studies stemming from the most modern scientific methods have been factors in establishing individual bargaining agreements. These valuable

property rights cannot lightly be taken from the employees concerned. To permit the Board to carry out its plan in this instance would not only deprive these employees of their rights, but would deprive them of effectively expressing their opinion of the taking. It is submitted that the Board has no authority or justification in the statute which would vest it with this power. Under the general provisions of the United States Constitution it is specifically prohibited from doing so. Fundamental concepts of Constitutional fair play necessarily condemn the Board's proposed seizure of these rights without authority or compensation to the individuals concerned.

THE ACTION OF THE NATIONAL MEDIATION BOARD IN DEPRIVING THE EMPLOYEES OF THEIR RIGHT TO VOTE AGAINST COLLECTIVE BARGAINING REPRESENTATION IS SUBJECT TO FEDERAL REVIEW UNDER THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

Apart from the right of the District Court to entertain jurisdiction in cases where the Board has deprived employees of rights given by Congress, or protected by Constitutional guarantees, the Court has jurisdiction under the Administrative Procedure Act. It is interesting to note that though the application of the Administrative Procedure Act was argued in the Court of Appeals, no reference is made with respect to it in the briefs on file herein of the National Mediation Board or the Brotherhood of Railway Clerks.

The Board's position that its actions are not subject to judicial review based upon the *Switchman's*

case, must be inspected in the light of *Airline Dispatchers Association v. NMB*, 89 U.S. App. D.C. 24, 189 Fed. 2d 685 (1951), cert. denied, 342 U.S. 841 (1951). This case discussed the sweeping language of the *Switchman's* case and concluded that a fundamental change had been brought about by the enactment of the Administrative Procedure Act, 5 U.S.C.A. 1001-11. (See Appendix.) It was noted that Section 1009 of that Act provided in part as follows:

> "Except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion—(a) Right of Review—any person suffering legal wrong because of agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (5 U.S.C.A. Section 1009.)

The Court continued by saying that although the Administrative Procedure Act was not intended to change existing case law as to particular issues which had been previously held not within judicial cognizance, such broad statements as that in the *Switchman's* case to the effect that in view of the history of the Railway Labor Act, a purpose to afford judicial remedy must plainly appear, "should now be read in the light of the purpose of the Administrative Procedure Act subsequently enacted." 89 U.S. at 28. The Court went on to quote from a document indicating that purpose:

> "Legislative intent to forbid judicial review must be if not specific in terms, at least clear, convincing and unmistakable under this Bill. The mere

fact that Congress has expressly not provided for judicial review would be completely immaterial. (Ibid.)"

The Court concluded that if the "nature of the question" was such as to suggest judicial review, then the Administrative Procedure Act would authorize such review. In the District Court, the determination was made that the "nature of the question", in this case, was one urgently requiring judicial review, stating that the question involves a "serious issue of statutory construction, possibly rising to constitutional dimensions." (R. 143.) In the light of this finding, the Administrative Procedure Act authorizes judicial review.

In the *Airline Dispatchers Association v. NMB*, 89 U.S. App. D.C. 24, 189 Fed. 2d 685 (1951), cert. denied, 342 U.S. 841 (1951), the Court further stated that the *Switchman's* decision did not preclude review by the Courts of Board action in determining a disputed question of representation under Section 2, 9th of the Railway Labor Act in these words:

> "Generalizations as to when judicial review of administrative action may or may not be obtained, are, of course, hazardous. Where Congress has not expressly authorized judicial review 'the type of problem involved as well as "history of the statute involved" become highly relevant.'
>
> "The type of question now presented was, as we have said, in the area of those reserved under the Railway Labor Act. This being so, and because of the nature of the question, we are of the opinion that the Administrative Procedure Act

indicates a congressional purpose to authorize review of it by the Courts. Since it is not a question of the type previously held unreviewable, and since there is no explicitness in the Railway Labor Act, or indication in its history of a Congressional intention to leave it exclusively to the Board determination, the provisions of Section 10 of the Administrative Procedure Act for Court review take hold of it.

"Court review not being precluded, jurisdiction of the District Court is found in 28 U.S.C. Section 1337, formerly U.S.C. Section 41 (8), which reads, 'The District Court shall have original jurisdiction of any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.' See Switchman's Union v. NMB, 320 U.S. at page 300, 64 S.Ct. at page 96, 88 L.Ed. 61."

The Court specifically referred to and rejected the principles set forth in the *General Committee v. Missouri KTR Company,* 320 U.S. 323, and *Order of Railway Conductors v. Pennsylvania Railroad Company,* 323 U.S. 166 as changed under its interpretation of the Administrative Procedure Act.

The respondent contends then, and the District Court and the Court of Appeals has agreed, that the Federal Court has jurisdiction of the cause. First, rising from the statute by virtue of an infringement by the National Mediation Board of a right given to employees under the Railway Labor Act. Second, by virtue of the fact that the action of the National Mediation Board is in excess of its statutory powers.

Third, as violative of the rights of the plaintiff's members and fundamental concepts of fair play under the Fifth Amendment to the Constitution of the United States, and Fourth by virtue of jurisdiction granted to the Court under the provisions of the Administrative Procedure Act.

These contentions are borne out by the cases in which courts have regularly taken jurisdiction to review the actions of the National Mediation Board in instances where serious issues of Constitutionality or statutory construction were presented.

Thus, in *Virginian Railway Company v. System Federation,* 300 U.S. 515 (1937), the Court took jurisdiction to decide whether or not the Railway Labor Act was within the power of Congress to enact, and whether such act required an employer to negotiate with a collective bargaining representative once such representative had been certified by the Board. In *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944), the Supreme Court held that there was jurisdiction to decide whether the Act required a union bargaining representative to represent all employees within the craft or class regardless of race, thereby reversing lower Federal Courts which held that there was no such jurisdiction.

Specifically distinguishing the *Switchman's Union* case, 323 U.S. at 213, in *Wes Chapter v. NMB,* 314 Federal 2d at 237, the Court of Appeals discussed the Board's procedures before reaching a conclusion that the "investigation" required by the statute, 45 U.S.C.

152, 9th, had been held, and that no constitutional question of due process was presented. The Court of Appeals also specifically took jurisdiction to determine the correctness of a construction of the statute by the Board which limited the statute's geographical scope. *Airline Dispatchers Association v. NMB,* 89 U.S. App. D.C. 24, 189 Federal 2d 685 (1951), cert. denied 342 U.S. 849 (1951).

On the foregoing arguments the respondent contends that the Federal Judiciary has jurisdiction to review the action of the National Mediation Board in providing for employees a ballot which was unfair in form so as to derogate and materially affect the right of employees to vote against collective bargaining representation.

ARGUMENTS OF THE NATIONAL MEDIATION BOARD.

In its brief, the National Mediation Board relies primarily on two points. First, that the case of *Leedom v. Kyne,* 358 U.S. 184, requires that judicial review is only possible where the Board's act was made in excess of its delegated powers and contrary to a specific prohibition in the Act, and secondly, that the Board under the Act, is subject to no limitation with respect to the manner in which an election is to be conducted and may, in fact, determine representation without an election at all.

With reference to the *Leedom v. Kyne* case, 358 U.S. 184, the National Mediation Board, in its briefs,

has consistently maintained that the employee has a right to vote against collective bargaining representation. If this is true, then how can the Board abridge and deny employee voters free exercise of that right? If the right is admitted to exist and to flow from the statute, how then can such abridgement or denial be interpreted to be other than an act contrary to a specific prohibition in the Act?

Once again, the argument points up the Board's dilemma. They have admitted that the employees possess the right to vote against representation. In spite of this view of the congressional expression, the Board somehow reaches the conclusion that it is entitled to take action which will influence or weight that expression. This position is untenable and places the Board's actions squarely within the purview of the *Leedom v. Kyne* case as in excess of its delegated powers and contrary to an admitted prohibition of the Act.

The second argument which contends that the Board is the sole arbiter of the manner in which a determination of representatives should be made cannot be true. There are many situations in which the Board would be clearly acting outside its delegated authority in an election wherein no question could be raised with respect to the right of the Federal Court to review it; for example, what of the instance wherein the Board would propose a ballot wherein the name of but one contending union would be placed on the ballot and the name of a second contending union omitted therefrom?

Although the statute provides that a determination of representation can be made without an election, this provision offers little help to the Board in this case wherein the Board has made its own decision that an election is to be conducted. Having made that decision, the Board is clearly bound to conduct the election in a manner which is fair and non-discriminatory as far as the methods of determining the intentions of the employee members are concerned.

The Board contends that this broad and general power granted to the Board is necessary to effectuate the purposes of the Railway Labor Act and is in some manner related to a special "expertise" which Board members, by virtue of long experience would possess. There are unquestionably some areas in the conduct of business before the National Mediation Board, wherein such prior knowledge and expertise are valuable and productive. It is, however, subject to serious question whether such relation can be made to a ballot form. It would seem that the creation and use of a fair and non-discriminatory ballot is the business of all of the citizens of the United States and is perhaps the very cornerstone of our democracy itself. No government board or agency possesses such knowledge or expertise which qualifies it to utilize a ballot which, in its discretion, could influence or slant its elections. Especially is this true when the action must be considered to be covert, as being done without the full knowledge or consent of the citizen employees with which the National Mediation Board is concerned.

This is not the type of question which an expert administrative body is needed to decide. Experience with the Railway Labor Act and administration of the Act adds little, if a ballot form created and used is not completely fair to all employee voters.

The Board has defended its actions at each hearing of this case on the argument that this ballot by the Board has been used since 1934 in some 3400 elections. It is difficult to see how this will assist the Board if in fact the rights of employee voters were being abridged. In its own publication, the Board notes objections to the ballot in past as follows:

> "Although occasionally it is suggested that the ballot used by the National Mediation Board does not permit a clear expression by a majority of eligible voters of their representation preference (Administration of the Railway Labor Act by the National Mediation Board 1934-1957 pp. 18-19), the Board's experience has been to the contrary."

Thus, while arguing the point, the Board admits that objections have been made and that they have been aware of the fact that employee voters have felt that this voting procedure was discriminatory and prevented a "clear expression by the majority of eligible voters of their representation preference."

The Board argues that there is no obvious great psychological advantage to the unions having boxes on the ballots whereas employees who oppose collective bargaining must express their will by following the instruction plain on the face of the ballot instead

of marking a box. But even this argument is qualified by the National Mediation Board in these words:

> "We may assume, however, that there is some advantage, indeterminate in degree because the form of the ballot seems to carry some slight assumption that the employees will want to designate one of the unions. That advantage, we submit, is no more than the statute itself contemplates." (National Mediation Board Brief pp. 31, 32.)

Even with the qualification, the argument is faulty, in that it is well-known that ballot composition and position is of extreme importance in any election proceeding. Instructions on the face of the ballot as shown in the first sections of this brief are not clear but in contrast thereto, are confusing and misleading. But the qualifying statement again emphasizes the position the Board is taking upon itself, namely, the obligation to create in favor of some representation, an advantage, although characterized as "indeterminate in degree." The Board has failed to demonstrate authority, in the Act, or the legislative history of the Act, justifying its seizure of this power.

The right of the employees either exists or it does not. The Board consistently maintains in its arguments and demonstrates that in its procedures, that the right in the employees to cast a vote or to indicate their preference for no representation exists. This being the fact, the Board has no right to in any way, confine or restrict the employees in their exercise of that right. The two positions of the Board simply cannot be reconciled.

In its argument, the National Mediation Board relies on *Rose v. BRC*, 181 F. 2d 944 (1950) and *Droggos v. NMB*, 227 Fed. Supp. 61 (N.D. Ohio), wherein the Courts considered the question raised as to the ballot form where a group of employees challenged a union already certified by the National Mediation Board because the ballot provided did not afford the employees an opportunity to vote against collective bargaining. In the *Droggos* case, the Court refused to enjoin the holding of an election among employees because of asserted invalidity of the ballot disagreed with the case at bar and relied on the *Rose* decision. It is our contention that the *Rose* case is not sufficient to support the *Droggos* decision. That case involved a motion by certain employees to intervene in a case filed by the Brotherhood of Railway Clerks against a railroad. The Brotherhood of Railway Clerks had been certified by the Board as a bargaining representative. The National Mediation Board was not a party to the case. The Court spoke of the exclusive jurisdiction of the National Mediation Board in the matter of certifying bargaining representatives. Specifically, the Court stated that the Board had exclusive jurisdiction over the determination of groupings of employees into bargaining units. The validity of the certification however, and therefore the form of the ballot question presented therein, was not reached by the Court, inasmuch as the Board was not a party to the action and was not present to defend itself. Here, a specific act of the Board is directly attacked. The general jurisdiction of the Board as it affected a collateral action in the *Rose* case, does not provide a defense in the case at bar.

THE DISTRICT COURT'S AFFORDING AN OPPORTUNITY TO THE NATIONAL MEDIATION BOARD TO RECONSIDER THE REQUEST OF THE RESPONDENT TO CONDUCT A HEARING ON THE COMPOSITION OF THE CRAFT OR CLASS, DID NOT ENJOIN THE NATIONAL MEDIATION BOARD FROM CONDUCTING AN ELECTION BEFORE SUCH A HEARING.

The District Court afforded the National Mediation Board an opportunity to reconsider its position with respect to the craft or class grouping in view of its holding with respect to the requirements of a ballot form in the following wording, quoting from the judgment (R. 156):

> "Because the Board's position on the other issues raised by the plaintiff—requesting a 'hearing' on the appropriateness of class or craft designated at which the plaintiff would have status as a party in interest—depends partly upon the Board's interpretation of the statute as not permitting a vote against representation, the Court will decline to express any opinion on those issues and will instead remand the matter to the Board for further consideration in light of the fact that the Board's interpretation of the statute has been found erroneous. . . ."

In the light of this statement in the judgment, it is felt that the Court is merely affording to the National Mediation Board an additional opportunity to consider its decision with respect to the hearing after being apprised of the fact that its view with regard to the ballot is incorrect. That this procedure is advisable is illustrated by the fact that the result of the election to be conducted, not only determines the representative of the craft or class concerned, but also, affords employee voters the right to register their

feeling with respect to the grouping of the craft or class. A negative result, that is, one in which the employee voters refuse to indicate a preference for a collective bargaining representative, can be considered not only to be a vote in opposition to the candidate unions in contention, but also, may be a vote against the manner in which the National Mediation Board has grouped employees. In view of the determination made by the Courts below, with respect to the form of the ballot, the National Mediation Board might well wish to reconsider the grouping and redraft the constituency so as to create a situation in which a more closely allied group of employees might be more likely to designate a representative. The National Mediation Board, with this knowledge, may desire to make a new decision with respect to a public hearing on the issue, and when that decision is made, an entirely new set of circumstances may well prevail.

The Board's objection to this opportunity for reconsideration is premature, in that it has not been compelled to make a finding in any specific manner with regard to whether or not it should grant a hearing on the question presented. In other words, the Board is not being instructed or directed by the Court with respect to what its findings should be, but is merely being afforded an additional opportunity to make the decision in view of the Court's determination of the law governing the Board's action as it concerns ballot form. The Board's objection is not substantial and indicates no injection by the Court of a power to determine Board action.

It is admitted by the National Mediation Board that the Board's refusal to reopen the prior craft or class determination rested on its view that the respondent as a group opposed to any representation lacked standing to challenge a unit determination (National Mediation Board Brief p. 61), while it is now admitted that the respondent as an organization consisting of employees opposing representation are a proper group and do have standing to complain that the National Mediation Board's procedures do not properly allow employees opposed to representation to express their desires. (National Mediation Board Brief p. 20, footnote.) In view of the Board's admission that respondent does have standing to complain of National Mediation Board procedures, it seems proper that the Court's opportunity to the Board to reconsider the matter should be permitted to stand. For it would appear that even in the absence of the ballot form question, the Board has now changed its position with respect to the basic question of respondent's standing before it.

Arguments which tend to support the position that respondent employee voters have standing to complain of a National Mediation Board procedure as it affected balloting but do not have standing to complain of National Mediation Board procedure as it affected a grouping in a class or craft is without support or authority in the act or cases interpreting the Railway Labor Act. Stating that the only reason for making craft or class determinations, is to determine who are representatives chosen by a

majority, is too narrow an interpretation. The employee voters in exercising their voting rights are voting for contending unions or individuals and at the same time are indicating their assent or objection to the grouping itself. This, in fact, is the only way in which concerned employees can express their consent or objection to the manner in which they have been grouped by the National Mediation Board. To declare that they have no legal cognizable interest in the electorate is once again an attempt to limit or restrict the rights of the employees concerned without statutory or other authorization.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in cases numbered 138 and 369 should be affirmed.

Dated, San Francisco, California,
December 23, 1964.

Respectfully submitted,
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(Appendix "A" Follows)

Appendix "A"

AMENDMENTS TO THE UNITED STATES CONSTITUTION

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

5 *U.S.C.A.* § 1009

JUDICIAL REVIEW OF AGENCY ACTION

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of Review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts Reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief Pending Review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.